91-832

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JAMES REYER,

PETITIONER,

V.

WILLIAM G. TODD, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the pre-briefing Ninth Circuit April 25 Order dismissing Plaintiff-Petitioner's appeal for alleged want of appellate court jurisdiction conflict with settled finality standards for collateral orders' not requiring district court Federal Rule of Civil Procedure ("FRCP"), Rule 54(b), certification?

2. Did the United States Court of Appeals in demanding Rule 54(b) district court certification for appellate review of collateral orders [conflicting with this Court's precedent in DiBella v U.S., 369 U.S. 121, 125-126 (1962), Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 432 n. 4, 438 (1956) and Cold

Metal Process Company v. United Engineering & Foundry Company, 351 U.S. 445, 453 (1956)] and thereby dismissing prior to briefing Plaintiff-Petitioner's appeal for alleged want of appellate court jurisdiction, deny Petitioner his substantive right to appellate review as a matter of right pursuant to 28 U.S.C. 1291 of those collateral orders?

3. Did the demand of the Ninth Circuit Court of Appeals for district court Rule 54(b) certification of collateral orders, a demand inconsistent with and conflicting with Ninth Circuit precedent and prevailing precedent in the Second, Third, Fifth, Seventh, Eighth and D.C. Circuits, thereby dismissing prior to briefing Plaintiff-Petitioner's appeal for alleged want of

appellate court jurisdiction, deny Petitioner appellate review as a matter of right pursuant to 28 U.S.C. 1291 of collateral orders factually based in the DiBella seized property collateral order doctrine, the Cohen collateral order doctrine for separate procedural rights and the Forgay-Conrad irreparable injury rule?

4. What are the minimum safeguards of Fifth Amendment procedural Due Process to ensure that an appeal of collateral orders is not dismissed for alleged want of appellate jurisdiction prior to briefing (1) without adequate fact finding, (2) without application of established Supreme Court standards for finality, (3) without review of the district court record and (4) without

evidence that the dismissal is a product of accountable Article III tribunal decision-making?

5. Did the issuance by a conference attorney, not an Article III Judge, prior to briefing and oral argument of an order to show cause why Petitioner's appeal should not be dismissed for alleged want of appellate court jurisdiction, deny Petitioner his right to have the collateral orders reviewed as a matter of right pursuant to 28 U.S.C. 1291 by a neutral, independent Article III tribunal, a procedural right of Petitioner secured by Article III, Section 1, of and the Due Process protections established in the Fifth Amendment to the United States Constitution?

6. Was the issuance by a conference attorney, not an Article III Judge, prior to briefing and oral argument, of an order to show cause why Petitioner's appeal should not be dismissed for alleged want of appellate jurisdiction in violation of the Federal Rules of Appellate Procedure ("FRAP") and 9th Circuit Rules ("9th Cir. Rules") that neither (1) expressly authorize the issuance of an order to show cause prior to briefing questioning the jurisdiction of an appeal nor (2) authorize a conference attorney, not an Article III Judge, by express delegation to issue such an order.

7. Did the unauthorized issuance by a non-Article III Judge prior to briefing of the order to show cause deny

Petitioner his briefing right, oral argument right, reply briefing right and briefing record reference right, all being procedural rights of Petitioner secured by Acts of Congress under 28 U.S.C. 2071 (a) and 2072 (a) and (b) and by the Due Process and Equal Protection safeguards established in the Fifth Amendment?

8. Was the pre-briefing dismissal of Petitioner's appeal of collateral orders for alleged want of appellate jurisdiction because of the absence of district court Rule 54(b) certification (conflicting with Supreme Court decisional precedent and with Ninth Circuit decisional precedent) arbitrary and capricious as itself inconsistent with Ninth Circuit Court Procedure

C.(4)(a), an internal operating procedure not constituting a 9th Circuit Rule providing for jurisdiction evaluation after briefing, thereby depriving Petitioner of a substantive 28 U.S.C. 1291 appellate right in violation of 28 U.S.C. 2072(b) and Due Process and Equal Protection guarantees established in the Fifth Amendment?

9. Was the dismissal of Petitioner's appeal of collateral orders without a briefing conference and prior to briefing and oral argument, on the basis of a conference attorney's issuance of an order to show cause that expressly ignored the description of those collateral orders in Petitioner's Civil Appeals Docketing Statement, arbitrary and capricious as inconsistent

with Ninth Circuit procedures governing its pre-briefing conference program (internal operating procedures not constituting 9th Circuit rules), thereby depriving Petitioner of a substantive appellate right in violation of an Act of Congress under 28 U.S.C. 2072(b) and Petitioner's Equal Protection guarantees and procedural Due Process rights established in the Fifth Amendment?

10. Did the absence of findings of fact, and absence of reasoned application thereof to collateral order principles established by this Supreme Court, in the Ninth Circuit April 25 order that dismissed Petitioner's appeal for alleged want of appellate jurisdiction, (the "April 25 Jurisdictional Dismissal Order") without

a pre-briefing conference, prior to the district court records being made available to the Ninth Circuit and prior to briefing and oral argument, deny Petitioner a written statement of fact-finding and reasons for depriving him of his substantive right to appeal the collateral orders in violation of 28 U.S.C. 2072(b) and minimum requirements of procedural due process?

11. Does a conference attorney, not an Article III Judge, have constitutional authority to find facts under a civil appeals docketing statement without a pre-trial conference, prior to the transfer of the district court record and prior to briefing and oral argument and to issue an order to show cause creating a non-

statutory presumption against appellate jurisdiction for collateral orders under 28 U.S.C 1291, consistent with the constitutional power of Congress to establish the jurisdiction of the inferior courts pursuant to Article III of the United States Constitution and the constitutional power of Article III Judges to determine that jurisdiction?

12. In the absence of briefing, absence of oral argument and the absence of consideration of the district court record in the court of appeals, does the absence of the signature of a Ninth Circuit Article III Judge on the March 19 Order to Show Cause, the April 25 Jurisdictional Dismissal Order and the July 25 Order denying Petitioner's petition for rehearing and suggestion

for rehearing en banc, as well as the absence of findings of fact and consideration in the Ninth Circuits Jurisdictional Dismissal Order of the Petitioner's collateral orders assertions deny Petitioner-Appellant of evidence that his right to appeal pursuant to 28 U.S.C. 1291 was heard by a neutral, independent Article III tribunal, a right secured by Article III of and the procedural Due Process provisions established in the Fifth Amendment of the United States Constitution?

13. What are the standards and procedures for sanctions in the United States Court of Appeals to maintain the integrity of the judicial process when an appeal is considered for dismissal

for alleged want of appellate jurisdiction prior to briefing and oral argument and prior to the application of briefing standards and when an appellee misrepresents to that appellate court the complaint amendment sequence and other material facts included in the district court record as well as argues inapplicable legal standards for the review of the collateral orders at hand?

14. Does the misrepresentation to the district court by appellees' counsel that the order drafted by appellees' counsel represented certain decisions made by the district court at the proceeding for which the purported order was signed by the district court render that order a collateral order appealable as of right as defrauding that district

court of its Article III judicial powers and defrauding Petitioner of his right to a neutral, independent Article III tribunal determination of Petitioner-Plaintiff's claims, secured by Article III of and the procedural Due Process safeguards established in the Fifth Amendment to the United States Constitution.

15. Does the misrepresentation to the district court by appellees' counsel that a superseded amended complaint was subject to review at the proceeding out of which the purported court order emerged render that order a collateral order appealable as of right as defrauding that district court of its Article III judicial powers and defrauding Petitioner of his right to a

neutral, independent Article III determination of Petitioner-Plaintiff's claims, secured by Article III of and the procedural Due Process safeguards established in the Fifth Amendment to the United States Constitution?

16. Did the orders of the district court appealed from fail to dismiss any of Plaintiff-Petitioner's claims because (1) defendant's counsel misrepresented to the district court that a superseded amended complaint was the subject of review before the district court at the time of the proceeding, (2) defendants' counsel misrepresented to the district court that the order, drafted by defendants' counsel and signed by the district court, represented certain decisions made by the district court at

that proceeding, (3) the misrepresented order failed to specify claims or portions thereof allegedly dismissed at the proceeding, (4) the misrepresented order failed to specify facts that appeared without substantial controversy, as required by Rule 56(d, FRCP, for cases not fully adjudicated and (5) the order referred vaguely to the "record" for reasons for partially granting defendants' motion?

17. Does the misrepresentation to the U.S. Court of Appeals of the complaint amendment sequence and other material facts contained in the district court factual record, by appellees' counsel in the pre-briefing dismissal of Petitioner's appeal for alleged want of appellate jurisdiction, defraud the U.S.

Court of Appeals of its Article III judicial duties and powers to review collateral orders, appealable as of right pursuant to 28 U.S.C. 1291, and defraud Petitioner-Plaintiff by depriving him of his substantive right to have those collateral orders reviewed on appeal procedurally by a neutral, independent Article III appellate tribunal?

PARTIES

The parties to the appeal to the United States Court of Appeals for the Ninth Circuit are James Reyer, Plaintiff-Appellant, and Defendants - Appellees William G. Todd, Able Towing Company, Charles R. Willard, Willard Lien Service and Laura Stager, Matthew J. LeBlanc, Salvatore V. Rosano, Kenneth R. Blackman, Rene A. Chouteau, Mark L. Hulsman, Nanci L. Burton, John J. Healy, Schuyler L. Jeffries, James E. Pedgrift and David F. Berto, individually and in their official capacities, and the City of Santa Rosa, California.

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(1) Certiorari should be granted because the pre-briefing Ninth Circuit April 25 Jurisdictional Dismissal Order requirement of Rule 54(b) district court certification for appellate review of collateral orders conflicts with this Court's precedent in DiBella, Mackey and Cold Metal Process. 21

(2) Certiorari should be granted because the pre-briefing Ninth Circuit April 25 Jurisdictional Dismissal Order requirement of Rule 54(b) district court certification for appealable review of collateral orders is inconsistent with and conflicts with Ninth Circuit precedent and prevailing precedent in the Second, Third, Fifth, Seventh, Eighth and D.C. Circuits. 22

(3) Certiorari should be granted because supervision of the courts of appeals require that minimum standards of Fifth Amendment procedural Due Process be established and followed to ensure that the appeal of collateral orders is not dismissed for alleged want of appellate jurisdiction prior to briefing (1) without adequate fact finding, (2) without application of established Supreme Court standards for finality of collateral orders, (3) without review of the district court record and (4) without evidence that the dismissal is the product of Article III decision-making. The enforcement of Due Process standards will prevent in this case and in future cases departure from the accepted and usual 24

course of judicial proceedings.

(4) Certiorari should be granted because supervision of the courts of appeals necessitates that this Court ensure that Article III judicial powers are exercised only by Article III Judges and that practices departing therefrom be prevented. 31

(5) Certiorari should be granted because supervision of the court of appeals and the district court necessitates that the integrity of those Article III tribunals be secured from misrepresentations of the record by defendants-appellees' counsel and that departures from that integrity be prevented. 38

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JAMES REYER,

Petitioner,

v.

WILLIAM G. TODD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James Reyer respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals of the Ninth Circuit, entered on April 25, 1991, dismissing Petitioner's appeal prior to briefing for alleged want of appellate jurisdiction.

ORDERS BELOW

The Ninth Circuit order, entered

April 25, 1991, dismissing the appeal of Petitioner for want of appellate jurisdiction, which is not published in official reports, is set forth at pp. A2-A3 of the Appendix. The Ninth Circuit order, entered July 25, 1991, denying Petitioner's petition for rehearing and rejecting Petitioner's suggestion for rehearing en banc, which is not published in official reports, is set forth at p. A6 of the Appendix. The order to show cause issued by a conference attorney, entered March 19, 1991, ordering Petitioner to show cause why is appeal should not be dismissed for want of appellate jurisdiction, which is not published in official reports, is set forth at pp. A4-A5 of the Appendix. The order of the district court, entered October 4, 1990, embracing the collateral orders of that

court from a court proceeding held on September 21, 1990, which is not published in official reports, is set forth at pp. A7-A9 of the Appendix.

JURISDICTION

The Order of the Ninth Circuit was entered on April 25, 1991. A timely petition for rehearing was filed, which was denied by an order entered July 25, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 2101(c) and Supreme Court Rules 13.1 and 13.4. Federal jurisdiction in the district court of first instance in this case is conferred under the provisions of 28 U.S.C. 1331 and 1343 for claims involving damages, injunctive and declaratory relief in Petitiorer's original complaint arising under 42 U.S.C. 1983, 1985(2), (3), 1986 and

1988, 15 U.S.C 1 and 28 U.S.C. 2201 and 2202.

CONSTITUTIONAL AND STATUTORY PROVISIONS, RULES AND OPERATING PROCEDURES INVOLVED

This cause involves the Due Process Clause of the Fifth Amendment to and Article III, Section 1, of the Constitution of the United States and 28 U.S.C. 1291, 2071(a) and 2072(a) and (b). Additionally, this case involves the application of Federal Rules of Appellate Procedure , Rules 33 and 34, Federal Rules of Civil Procedure, Rules 15(a), 54(b) and 56(d), and 9th Circuit Rules 33-1, 34-4 and 42-1. Also implicated are court procedures for the Ninth Circuit C.(4) (a) and procedures for the prebriefing conference program

B.7 and C.6, both not constituting rules of the Ninth Circuit.

STATEMENT OF THE CASE

A. Jurisdictional Dismissal of Petitioner's Appeal Prior to Briefing

The Ninth Circuit order dismissed as allegedly without appellate jurisdiction Petitioner's appeal of a district court order that embraced at least three (3) collateral orders. In doing so, the Ninth Circuit skirted consideration or mention of those collateral orders in this dismissal and found no facts affirming or negating the existence of collateral orders that confer appellate jurisdiction on Petitioner's appeal as a matter of right pursuant to 28 U.S.C. 1291. Such

presence or absence of collateral orders is by nature factually determined.

Instead, this dismissal order apparently relied on the absence of certification by the district court, as set forth in rule 54(b), Federal Rules of Civil Procedure ("Rule 54(b)"), to sustain its dismissal of Petitioner's appeal. This misapprehension of law on finality evidences an inacquaintance with the independence of collateral order doctrine from Rule 54(b) certification. DiBella v. U.S., 369 U.S. 121, 125-126 (1962) ("DiBella"), Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 432 n. 4, 438 (1956) ("Mackey"), Cold Metal Process Company v. United Engineering & Foundry Company, 351 U.S. 445, 453 (1956) ("Cold Metal Process").

DiBella itself acknowledges as a collateral order for the purposes of appeal appellate review of motions for the return of seized property in proceedings independent of and no way tied to criminal proceedings. DiBella v. U.S., supra, esp. at 129-132. See also Cogan v. U.S., 278 U.S. 221, esp. at 120 (1929). This independence of collateral orders from the requirement of Rule 54(b) certification further embraces collateral orders developed from the line of cases and doctrine under Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949) ("Cohen") and Forgay v. Conrad, 6 How. (47 U.S.) 201 (1848) ("Forgay - Conrad"). See Sears, Roebuck and Co. v. Mackey, supra, at 432 n.4.

Despite the apprisal in

Petitioner's Civil Appeals Docketing Statement to the Ninth Circuit that the district court order appealed from embraced collateral orders under DiBella, Cohen and Forgay - Conrad, a conference attorney issued an order to show cause for the appellate court stating that "Review of appellant's Civil Appeals Docketing Statement indicates that the order appealed from is not a final, appealable order." This March 19 order to show cause (the "March 19 Order to Show Cause") ordered Petitioner to voluntarily dismiss the appeal or "show cause why it should not be dismissed for lack of jurisdiction," gave the appellees a right to respond to Petitioner's memorandum, but did not bestow on Petitioner a right of reply. See March 29 Order to Show Cause at pp.

A4-A5 of the Appendix.

The March 19 Order to Show Cause was issued for the Ninth Circuit by a conference attorney without a pre-briefing or other prehearing conference. The March 19 Order to Show Cause was issued by a person who is not an Article III Judge, despite the restraint of the exercise of Article III judicial power through Ninth Circuit Court Procedure C. (4) (a):

> "C.(4)(a) Inventory. After appellate briefing has been completed, the court law clerks review the excerpt of records and briefs in each case in order to identify jurisdictional defects... Cases suffering from clear jurisdictional defects are processed through a motions panel as soon as the defects are noted."

The March 19 Order to Show Cause was not issued by an Article III motions panel. It was issued by a conference

attorney without a pre-briefing or other prehearing conference. It was issued prior to briefing and the opportunity for oral argument (1) without adequate fact-finding, (2) without application of established Supreme Court Standards for finality, (3) without review of the district court record and (4) without evidence that the order was the product of accountable Article III tribunal decision-making.

B. April 25 Jurisdictional Dismissal Order Ignores Supreme Court Collateral Orders Doctrines and Fact Finding with Respect Thereto

The Ninth Circuit April 25 Order dismissing Petitioner's appeal as allegedly without appellate jurisdiction (The "April 25 Jurisdictional Dismissal Order") skirts consideration or mention of the collateral orders described in

Petitioner's Civil Appeals Docketing Statement and in Petitioner's memorandum in response to the March 19 Order to Show Cause. The April 25 Jurisdictional Dismissal Order finds no facts affirming or regarding the existence of collateral orders that confer on the United States Court of Appeals For The Ninth Circuit jurisdiction as a matter of Petitioner's right pursuant to 28 U.S.C. 1291. The Ninth Circuit's April 25 Jurisdictional Dismissal Order parrots the March 19 Order to Show Cause. See April 25 Jurisdictional Dismissal Order at pp. A2-A3 of the Appendix.

C. Appellee Misrepresentation to Ninth Circuit of Complaint Amendment Sequence and Other Material Facts Contained in District Court Record.

In opposition to Petitioner's memorandum response to the March 19

Order to Show Cause, appellees' counsel misrepresented to the Ninth Circuit the complaint amendment sequence and other material facts contained in the factual district court record. This opposition was served by mail on Petitioner on April 11, 1991.

While not approved by the March 19 Order to Show Cause to file a reply to Appellees' misrepresentations, Petitioner filed on Friday, April 19, 1991, such a reply. The April 25 Jurisdictional Dismissal Order was entered on April 25, 1991. As that dismissal order skirts consideration or mention of collateral orders, finds no facts negating or affirming their existence and finds no facts sustaining the application of Rule 54(b) to the appeal, Petitioner knows not whether his

reply was reviewed in the decision to dismiss that was entered on April 25 or whether appellees' misrepresentations went uncontested. The April 25 Jurisdictional Order was entered prior to briefing and prior to oral argument. Petitioner's reply was not entered in the Ninth Circuit docket sheet of his appeal.

D. **District Court Collateral Orders.**

The district court orders that are being sought to be reviewed on appeal by Petitioner as collateral orders were embraced in an order entered by the district court on October 4, 1990.

The district court under that order (the "district court October 4 order") denied Petitioner-Plaintiffs' cross-motion seeking the return of seized property ("Petitioner's Motion to

Release Seized Property"). Petitioner had sought in that motion to prevent further irreparable harm to Petitioner through district court determination that Petitioner's 4-door Volvo Sedan and articles of professional and personal property contained therein were illegally seized on October 26, 1988, and were illegally withheld from Petitioner by defendant municipality and its agents since that date. The district court October 4 order denial of the release of such property thereby failed to forestall further irreparable harm to Petitioner, as set forth in Petitioner-Plaintiff's verified pleadings, declarations and other papers filed with the district court.

The district court October 4 order additionally included a collateral order

denying Petitioner his Rule 15(a), Federal Rules of Civil Procedure ("Rule 15(a)") first sentence right to amend his original complaint once as a matter of right prior to a responsive pleading by defendants. This Rule 15(a) first sentence procedural right is recognized in the Ninth Circuit. Allen v. Veterans Administration, 749 F. 2d 1386, 1388-89 (9th Cir. 1984), Kennedy, J.

Petitioner had moved in the proceeding out of which the district court's October 4 order emerged for the district court to recognize that Rule 15(a) first sentence right in order in part to return to his complaint independent and alternative claims contained in Petitioner's original complaint, as well as requests for injunctive and declaratory relief and

averments of the unconstitutionality of certain state statutes.

Petitioner's original complaint concerned the illegal search and seizure by a municipality and its agents on October 26, 1988, and continuing detention thereby (which detention continues as of the date hereof) of Petitioner's 4-door Volvo sedan and articles of professional and personal property contained therein, and alleged individual and collective acts and omissions to act, fraudulent, oppressive, malicious and otherwise, over a period of nearly twelve (12) months by sixteen (16) named defendants and a number of unknown defendants.

The district court through an arbitrary fifteen (15) page limitation and other content restrictions had

forced Petitioner to amend his original complaint and thereby forced Petitioner to delete without a hearing certain 1983 special pleading requirements, certain custom, policy and practice allegations, certain independent and alternative claims (state pendant as well as Federal), certain requested injunctive and declaratory relief and all declarations of state statute unconstitutionality that had been included in Petitioner's original complaint filed in the district court.

After unsuccessfully requesting the district court to lift the fifteen (15) page and other content restrictions, Petitioner moved to vacate those restrictions. The district court October 4 order denied Petitioner's motion and permitted only amendment for

a single claim under 15 U.S.C., Section 1, a claim that had been included in Petitioner's original complaint. The district court specifically denied Petitioner's Rule 15(a) first sentence right to return to his amended complaint claims averred in his original complaint for violations of 42 U.S.C., Sections 1985(2), (3) and 1986. The district court, thus, through arbitrary page and content procedural restrictions eliminated certain claims from being considered by the district court for decision on their merits.

Petitioner apprised the Ninth Circuit in the Civil Appeals Docketing Statement and in his memorandum in response to the March 19 Order to Show Cause of these collateral orders embraced in the district court October 4

order and their application under the DiBella, Cohen and Forgay-Conrad doctrines.

E. Appellees' Counsel Misrepresentations to District Court in Counsel Drafted Order and at Proceeding Related Thereto.

The district court October 4 order was drafted by appellees' counsel and did not represent certain decisions made by the district court at the proceeding for which the purported order was signed by the district court. In addition, appellees' counsel misrepresented to the district court a superseded amended complaint as the amended complaint that was subject to review at the proceeding out of which the purported court order emerged.

The district court signed the district court October 4 order and

incorporated into that order the reasons set forth in the record of the case. The transcript of proceedings relating to the district court October 4, 1990 order was entered into the record of the case on February 14, 1991, and was not part of the record at the time the district court October 4 order was signed. The district court expressly excluded from that order the reasons read into the record at the proceeding out of which the order emerged. The action of the district court under that order is vague.

REASONS FOR GRANTING WRIT

(1) **Certiorari should be granted because the pre-briefing Ninth Circuit April 25 Jurisdictional Dismissal Order requirement of Rule 54(b) district court certification for appellate review of collateral orders conflicts with this Court's precedent in DiBella, Mackey and Cold Metal Process.**

The demand for district court Rule 54(b) certification in the Ninth Circuit April 25 Jurisdictional Dismissal Order evidences an inacquaintance with the independence of collateral orders doctrine from Rule 54(b) certification and with the facts of the district court record. Such a requirement for Rule 54(b) certification for the appeal of collateral orders conflicts with this Court's decisions in DiBella v. U.S., supra, at 125-126; Sears, Roebuck and Co., v. Mackey, supra, at 432 n. 4, 438; and Cold Metal Process Company v. United

Engineering & Foundry Company, supra, at 453.

(2) **Certiorari should be granted because the pre-briefing Ninth Circuit April 25 Jurisdictional Dismissal Order requirement of Rule 54(b) district court certification for appellate review of collateral orders is inconsistent with and conflicts with Ninth Circuit precedent and prevailing precedent in the Second, Third, Fifth, Seventh, Eighth and D.C. Circuits.**

The demand for district court Rule 54(b) certification for appellate review of collateral orders pursuant to 28 U.S.C. 1291 is also inconsistent with and conflicts with Ninth Circuit precedent. Pride Shipping Corporation v. Taft Lumber Company, 898 F. 2d 1404, 1406 (9th Cir. 1990); United California Bank v. Fadel, 482 F. 2d 274, 276 (9th Cir. 1973); Hartford Fire Insurance Company v. Herrald, 434 F. 2d 638, 639

(9th Cir. 1970); Norman v. McKee, 431 F. 2d 769, 773 (9th Cir. 1970).

This demand is also inconsistent with and conflicts with prevailing precedent in the Second, Third, Fifth, Seventh, Eighth and D.C. Circuits. Chabot v. National Securities & Research Corp., 290 F. 2d 657, 659 (2nd Cir. 1961); DeNublio v. U.S., 343 F. 2d 455, 456-457 (2nd Cir. 1965); United Bonding Co. v. Stein, 417 F. 2d 721 (3rd Cir. 1969); Piambino v. Bailey, 610 F. 2d 1306 (5th Cir. 1980); Diaz v. Southern Drilling Corp, 427 F. 2d 1118 (5th Cir. 1970); In re General Motors Corporation Engine Interchange Litigation, 594 F. 2d 1106, 1118 n.12 (7th Cir. 1979); Swanson v. American Consumer Industries, Inc., 517 F. 2d 555,560-561 (7th Cir. 1975); Baxter v. United Forest Products Co.,

406 F. 2d 1120, 1123 (8th Cir. 1969); Redding & Co. v. Ruswine Construction Corp., 417 F. 2d 721, 726 (D.C. Cir. 1969). See also 10 Wright, Miller & Kane, Federal Practice and Procedures, Section 2658.4 (1983), 6 Moore, Federal Practice, P 54.31 (2nd ed., 1986); Bator, Meltzer, Mishkin, Shapiro, The Federal Courts and the Federal System, pp. 1815-1816 (3rd ed., 1988); 75 Harvard Law Review, 351, 367 (1961-62).

(3) **Certiorari should be granted because supervision of the courts of appeals requires that minimum standards of Fifth Amendment procedural Due Process be established and followed to ensure that the appeal of collateral orders is not dismissed for alleged want of appellate jurisdiction prior to briefing (1) without adequate fact-finding, (2) without application of established Supreme Court standards for the finality of collateral orders, (3) without review of the district court record and (4) without**

> evidence that the dismissal is a product of Article III decision-making. The enforcement of such Due Process standards will prevent in this case and in future cases departure from the accepted and usual course of judicial proceedings.

This Court and the Ninth Circuit have long recognized that when a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. Mach-Tronics, Incorporated v. Zirpoli, 316 F. 2d 820, 824 (9th Cir. 1963), citing Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1908); Meredith v. City of Winterhaven, 320 U.S. 228, 234 (1943); Propper v. Clark, 337 U.S. 472, 489-490 (1949); and Allegheny County v. Frank Mashuda, 360 U.S. 185, 188-189 (1959). See also Cohens v. Virginia, 6 Wheat. 264, 404,

5th L. Ed 257, 291 (1821). Jurisdiction to consider an appeal is not discretionary, and decisions of this Court have recognized that collateral orders are final and appealable pursuant to 28 U.S.C. 1291. Firestone Tire and Rubber Co., v. Risjord, 449 U.S. 368, 374 (1981).

This court has, indeed, recognized that appellate courts only have power that is authorized by Article III and statutes authorized by Congress pursuant thereto and that every appellate court has a special obligation to satisfy itself, based upon the record, of its own jurisdiction under that authority. Bender v. Williamsport Area School District, 475 U.S. 534, 541-542 (1986). This is of special importance when a constitutional question is presented.

Id, at 542.

The Ninth Circuit April 25 Jurisdictional Dismissal Order avoided consideration or mention of the collateral orders described by Petitioner in the Civil Appeals Docketing Statement and in Petitioner's memorandum in support of jurisdiction. The Ninth Circuit April 25 Jurisdictional Dismissal Order, dismissing Petitioner's appeal as allegedly without appellate jurisdiction, found no facts affirming or negating the existence of collateral orders that establish Petitioner's right to appeal as a matter of right pursuant to 28 U.S.C 1291. That order does not evidence that this Court's collateral orders doctrines under DiBella, Cohen or Forgay-Conrad were even considered in

the disposition of Petitioner's appeal. Collateral orders by their nature are factually determined.

The district court record had not been made available to the Ninth Circuit at the time of the April 25 Jurisdictional Dismissal Order was entered. While Petitioner filed a reply to appellees counsels' complaint amendment sequence and other misrepresentations of the district court record to the Ninth Circuit shortly before the entry of the April 25 Jurisdictional Dismissal Order, the absence of fact-finding in that order does not evidence whether or not those misrepresentations to the Ninth Circuit went uncontested prior to the entry thereof. Petitioner's reply to appellees counsels' misrepresentations

was not entered in the Ninth Circuit docket sheet of Petitioner's appeal.

The cases cited in the April 25 Jurisdictional Dismissal Order are distinguishable from the case underlying Petitioner's appeal. The DiBella, Forgay-Conrad and Cohen collateral order doctrines of this court obviate the need for the Rule 54(b) certification set forth in Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981). The factually vacant Proud v. U.S., 704 F.2d 1099 (9th Cir. 1983) does not disclose whether or not the right to amend therein was asserted as a matter of right to return to the complaint for presentation for hearing on the merits by the court claims and pleading matters included in the Plaintiff's original complaint. Proud, like Chacon v. Babcock, does not discuss

the right to appellate review of a final order on the basis of the DiBella, Forgay-Conrad and Cohen standards, and the factually obscure Proud case has never been cited for any purpose in the published decisions of the Ninth Circuit or any other court.

This Court should note that the April 25 Jurisdictional Denial Order parrots the conclusion of non-jurisdiction and citations included in the March 19 Order to Show Cause issued by a conference attorney. See pp. A2-A3 of the Appendix. That order does not face the at least three (3) collateral orders clearly described in Petitioner's Civil Appeals Docketing Statement.

Due process necessitates a reasoned decision to provide the assurance (critical to fairness as well and the

appearance of fairness) that a decision depriving a litigant of a right implicating a fundamental constitutional question[1] is not capricious and is based on an evaluation of the fairly-presented record of the action at hand. Wolf v. McDonnell, 418 U.S. 539, 563-565 (1974); Morrisey v. Brewer, 408 U.S. 471, 489 (1972); Arizona v. Washington, 434 U.S. 497, 517 (1978).

(4) Certiorari should be granted because supervision of the courts of appeals necessitates that this Court ensure that Article III judicial powers

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[1] Petitioner's 4-Door Volvo Sedan and the Professional and Personal Property contained therein were seized by defendant municipality and its agents on October 26, 1988 without a warrant, without prior notice or hearing and has been withheld from Petitioner since that time to the date hereof without notice of the opportunity for a post-seizure hearing. Petitioner has never been charged with the violation of any law in connection with the seizure of his property.

> **are exercised only by Article III Judges and that departures from such exercise be prevented.**

The March 19 Order to Show Cause created a non-statutory presumption against appellate jurisdiction for collateral orders under 28 U.S.C. 1291. The issuance of this order evidences an inacquaintance with the independence of collateral order finality doctrine under 28 U.S.C. 1291 from Rule 54(b). The order additionally evidences an inacquaintance with the facts of the district court record. Petitioner's Civil Appeals Docketing Statement clearly described the collateral orders as collateral orders sought to be reviewed under DiBella, Forgay-Conrad and Cohen. Even so, The March 19 Order to Show Cause declares "Review of appellant's Civil Appeals Docketing

Statement indicates that the order appealed from is not a final, appealable order."

This order to show cause indicates that it was issued "FOR THE COURT" by a conference attorney. See pp. A4-A5. The order also informs Petitioner that his appeal will be dismissed by order of the Clerk for non-compliance with the order, though the authority of that clerk to do so applies only for failure to comply with rules recognizing processing of the appeal for hearing.[2]

There are no rules authorizing a conference attorney in the Ninth Circuit to issue an order to show cause for the dismissal of an appeal for lack of jurisdiction. In point of fact, there

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[2] 9th Cir. Rule 42-1; see p. A20 hereof.

is an internal operating procedure (not constituting a 9th Circuit Rule) that provides for the processing of cases suffering from clear jurisdictional defects (1) only through a motions panel, (2) only after appellate briefing has been completed and (3) only after review by law clerks of the excerpt of the record and briefs in the cause in order to identify jurisdictional deficiencies.[3] There is another procedure that permits a conference attorney by order to address the question of jurisdiction in a specific form and time period "if the docketing statement indicates a jurisdictional

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[3] Court procedure: C.(4)(a); see pp. A20-A21 hereof.

defect."[4] There is no authority in this latter procedure to create a presumption against jurisdiction through an order to show cause.

Additionally, a conference attorney is limited by court procedure to issuing without a prebriefing conference only those orders that regulate length of briefs, joint briefing, setting the schedule for filing records and briefs or regulating any other aspect of the appeal that could be handled at a conference.[5]

The Chief Judge of the Ninth

---

[4] Procedure governing prebriefing conference program: B.7. See p. A21 hereof.

[5] Procedure governing prebriefing conference program: C.6; see pp. A21-A22 hereof. Rule 33, FRAP, authorizes only the court or a judge thereof to hold a prehearing conference. 9th Cir. Rule 33-1 conflicts with Rule 33, FRAP. See pp. A13-A14 hereof.

Circuit has expressly stated in the forward to the July 1, 1990 edition of the 9th Circuit Rules that the Ninth Circuit Court's internal operating procedures were incorporated into the Advisory Committee notes, but that those notes are not part of the 9th Circuit Rules themselves.

The conference attorney's issuance of the March 19 Order to Show Cause deprived Petitioner of his briefing right, oral argument right, reply briefing right and briefing record reference right under the Federal Rules of Appellate Procedure and the 9th Circuit Rules. Practices inconsistent with these rules are violative of 28 U.S.C. 2071(a) and 2072(a) and (b). See pp. A12-A13 hereof. No practice inconsistent with the rules established

by the Supreme Court can be admissible to control the proceedings on appeal. Bank of U.S. v. White, 33 U.S. 262, 269 (1834).

In addition, the present use as a jurisdictional testing device of an order to show cause and its implicit non-statutory presumption in the instant appeal against collateral order finality is itself of questionable vintage and authority. The Ninth Circuit in December, 1990, eliminated from the 9th Circuit Rules incorporation therein of the Federal Rules of Civil Procedure, thereby expunging any authority thereunder as a source of such judicial action.

A conference attorney, not an Article III Judge, incorrectly found facts under Petitioner's Civil Appeals

Docketing Statement and issued the March 19 Order to Show Cause. In addition to creating a non-statutory presumption against appellate jurisdiction for collateral orders, this pre-briefing order indicated that Petitioner's appeal would be dismissed by the Clerk if Petitioner did not comply with the order. The Clerk had no authority to do so under the 9th Circuit Rule cited in the March 19 Order to Show Cause. See note 2.

The Ninth Circuit April 25 Jurisdictional Dismissal Order parrots the March 19 Order to Show Cause.

(5) Certiorari should be granted, because supervision of the court of appeals and the district court necessitates that the integrity of those Article III tribunals be secured from misrepresentations of the record by defendants-appellees' counsel and that

departures from that integrity be prevented.

In opposition to Petitioner's memorandum in response to the March 19 Order to Show Cause, defendants-appellees' counsel misrepresented to the Ninth Circuit the complaint amendment sequence and other material facts contained in the district court record. This misrepresentation was part of a pattern and practice of that counsel, commenced in the district court, to misrepresent to the court the record of the case.

The district court October 4 order was drafted by defendants-appellees' counsel and did not represent certain decisions made by the district court at the proceeding for which the purported order was signed by the district court. In addition, that counsel misrepresented

to the district court a superseded amended complaint as the amended complaint that was subject to review at the proceeding out of which the purported court order emerged.

These misrepresentations have defrauded the district court and may have defrauded the court of appeals from exercising their Article III judicial power to issue appropriate orders. Thomas v. Arn, 474 U.S. 140, 153-156 (1985), citing U.S. v. Raddatz, 447 U.S. 667, 681-683 (1980); Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 (1982); Crowell v. Benson, 285 U.S. 22, 51 (1932).

If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by

Article III Judges over the interpretation, declaration and application of federal law. Pacemaker Diagnostic Clinic of America v. Instromedix, 725 F.2d 737, 544 (9th Cir. 1984), Kennedy, J.

The loss of that control denies Petitioner his right to constitutional review of his claims, as well as his statutory right to appeal such loss of control, in violation of those rights secured both by Article III and the Due Process Clause of the Fifth Amendment. Thomas v. Arn, supra, at 153-155; Pacemaker Diagnostic Clinic of America v. Instromedix, supra, at 541, 542.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the Ninth Circuit April 25 Jurisdictional Dismissal Order.

Dated:
October 22, 1991

Respectfully submitted,

/s/ James Reyer

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(707) 576-1244

Counsel to Petitioner

APPENDIX

ORDERS

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES REYER,	)	No. 91-15273
Plaintiff-Appellant,	)	DC# CV-89-03839-VRW
vs.	)	Northern California
WILLIAM G. TODD, et. al.,	)	(San Francisco)
Defendants-Appellees.	)	ORDER (Filed April 25, 1991)

Before: NORRIS, BEEZER and O'SCANNLAIN, Circuit Judges

Appellant seeks to appeal the district court's order filed on October 4, 1990, which, among other things, granted him leave to amend his complaint. Because such an order is not appealable, appellant was ordered to show cause why his appeal should not be dismissed for lack of jurisdiction. See Fed. R. Civ. P. 54(b); Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981); Proud v. United States, 704 F.2d 1099

(9th Cir. 1983).

Appellant has timely responded to the order to show cause. However, he has failed to demonstrate that the order which he seeks to appeal is an appealable order. Therefore, the appeal is dismissed for lack of jurisdiction.

MoCal 4/22/91

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES REYER,	)	No. 91-15273
Plaintiff-Appellant,	)	DC# CV-89-03839-VRW
vs.	)	Northern California
WILLIAM G. TODD, et. al.,	)	(San Francisco)
Defendants-Appellees.	)	ORDER (Filed March 19, 1991)

Review of appellant's Civil Appeals Docketing Statement indicates that the order appealed from is not a final, appealable order. See Fed. R. Civ. P. 54(b); Chacon V. Babcock, 640 F.2d 221 (9th Cir. 1981); Proud v. United States, 704 F.2d 1099 (9th Cir. 1983).

Within 14 days of the entry of this order, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If

appellant elects to show cause, appellees may respond within 10 days after service of appellant's memorandum.

If appellant does not comply with this order, the appeal will be dismissed by the Clerk under Ninth Circuit Rule 42-1.

The briefing schedule is suspended during the pendency of this order to show cause. If the appeal is not dismissed by the court, an order will be issued setting forth the due dates for the briefs.

FOR THE COURT;

/s/ Meg Gerrity

Meg Gerrity
Conference Attorney

3.15.91a(bs)/1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES REYER,	)	No. 91-15273
Plaintiff-Appellant,	)	DC# CV-89-03839-VRW
vs.	)	Northern California
WILLIAM G. TODD, et. al.,	)	(San Francisco)
Defendants-Appellees.	)	ORDER (Filed July 25, 1991)

Before: NORRIS, BEEZER and O'SCANNLAIN, Circuit Judges

Appellant's Petition for rehearing is denied. Appellant's suggestion for rehearing en banc is rejected.

M.Ord 7/23/91

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES REYER, Plaintiff-Appellant, vs. WILLIAM G. TODD, et. al., Defendants-Appellees.	Civil Action No.: C 89-3839 VRW ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ORDER DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT
(Filed October 4, 1990)	

Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment came on regularly

for hearing before this Court on September 21, 1990. Theresa L. Cunningham, Deputy City Attorney, appeared as attorney for Defendants City of Santa Rosa, et al. and Plaintiff James Otis Reyer appeared on his own behalf.

After considering the moving and opposition papers, arguments of counsel and all other matters presented to the Court, it is HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted in part and denied in part for the reasons set forth on [VRW] Initialed ~~as read into~~ the record at the hearing on September 21, 1990. It is further ordered that Plaintiff's Cross-Motion for Summary Judgment is denied.

Plaintiff may amend his complaint, insofar as he is able, to allege a cause of action solely for violation of 15 USC 1 et seq.

with the Court and serve on Defendants this amended complaint no later than Monday, October 22, 1990. Defendants shall answer Plaintiff's complaint and/or amended complaint twenty days after the service of Plaintiff's amended complaint; or if there is no amended complaint, twenty days after Plaintiff's amended complaint is due.

DATE: 10/3/90

/s/ Vaughn R. Walker

JUDGE VAUGHN R. WALKER

ORDER

APPENDIX
CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES AND OPERATING PROCEDURES

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

Amendment V

> No person shall be ... deprived of his life, liberty, or property, without due process of law; ...

This case also involves Article III, Section 1, of the Constitution of the United States, which provides as follows:

Article III

> Section. 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Additionally, this case involves 28 U.S.C. 1291, which provides as follows:

> 1291. Final Decisions of district courts
>
> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

This case involves 28 U.S.C. 2071(a), which provides as follows:

> 2071. Rule-making power generally
>
> (a) The Supreme Court and all courts established by Act of Congress may from time to time

> prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

This case involves 28 U.S.C. 2072, which provides as follows:

> 2072. Rules of procedure and evidence; power to prescribe
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Rule 33, Federal Rules of Appellate

Procedure and 9th Circuit Rule 33-1 provide as follows, respectively:

> Rule 33. Prehearing Conference
> The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

> Rule 33-1. Civil Appeals Docketing Statement; Prebriefing Conference Program
> Except as provided in this rule, the appellant/petitioner in each civil case shall complete and submit a Civil Appeals Docketing Statement on the form provided by the court. This requirement shall

not apply to: (a) appeals filed by prisoners not represented by counsel; (b) appeals from actions filed under 28 U.S.C. Section 2254 and 2255; (c)appeals permitted by the court under 28 U.S.C. section 1292(b); (d) mandamus petitions; (e) petitions for review of Board of Immigration Appeals decisions under 8 U.S.C. section 1105(a); and (f) petitions for review and applications for enforcement of National Labor Relations Board decisions under 29 U.S.C. section 160(e), (f). In any civil case, the court may direct that a conference be held before a judge of the court or a senior staff member designated as a conference attorney. The procedures governing the prebriefing conference program are available from the Clerk.

Rule 34(a), Federal Rules of Appellate Procedure, and 9th Circuit Rule 34-4 provide as follows, respectively:

Rule 34. Oral Argument
(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three

judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Rule 34-4. Classes of Cases to Be Submitted Without Oral Argument

Pursuant to FRAP 34(a), there is hereby established a class of cases to be submitted without oral argument. There

> may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a 3-judge panel of this court is of the unanimous opinion that: (a) the appeal is frivolous; or (b) the dispositive issue or set of issues has been recently authoritatively decided; or (c) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed. When a case has been classified by the court for submission without oral argument, the Clerk shall give the parties notice in writing of such action. The parties shall have 10 days from the date of the Clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.

Rule 15(a), Federal Rules of Civil Procedure, provides in pertinent part as

follows:

> "**Rule 15. Amended and Supplemental Pleadings.**
> (a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...

Rule 54(b), Federal Rules of Civil Procedure, provides:

> 54(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.**
> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and directions, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action

as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

Rule 56(d), Federal Rules of Civil Procedure, provides:

> **56(d) Case Not Fully Adjudicated on Motion**
> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established, and the trial shall be conducted accordingly.

9th Circuit Rule 42-1 provides as follows:

> **Rule 42-1. Dismissal for Failure to Prosecute**
> When an appellant fails to file a timely record, pay the docket fee, file a timely brief, or otherwise comply with rules requiring processing the appeal for hearing, an order may be entered dismissing the appeal. In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate, including imposition of disciplinary and monetary sanctions on those responsible for prosecution of the appeal.

Ninth Circuit Court Procedure C.(4)(a), an internal operating procedure not constituting a 9th Circuit Rule, provides as follows:

> C.(4) (a) **Inventory.** After appellate briefing has been completed, the court law

clerks review the excerpt of record and briefs in each case in order to identify jurisdictional defects and the primary issues raised in the appeal and to assign a numerical point designation to the case reflecting the relative amount of judge time that likely will have to be spent on the matter. Cases suffering from clear jurisdictional defects are processed through a motions panel as soon as the defects are noted.

Ninth Circuit procedures governing the prebriefing conferences program, procedures not constituting 9th Circuit Rules, in pertinent part, provide as follows:

B. Docketing Statement

7. If a docketing statement indicates a jurisdictional defect, a judge, conference attorney, or motions attorney may direct the parties by order, letter, or telephone to address the question of jurisdiction in a specific form and time period.

C. Prebriefing Conference

6. Conferences cannot be held

in all appeals. In a case in which review of the docketing statement indicates that a conference would be unnecessary or inappropriate, a Conference Attorney may issue an order limiting the length of briefs, requiring joint briefing, setting the schedule for filing records and briefs, or regulating any other aspect of the appeal that could be handled at a conference. Upon written request of counsel, the scheduling order may be amended by the Conference Attorney or a conference may then be scheduled. Alternately, an order may be issued simply exempting the case from these Procedures.